Filed 6/9/14 Akin v. Prado CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRUCE AKIN,

Plaintiff and Appellant,

v.

SERGIO PRADO,

Defendant and Respondent.

F066482

(Super. Ct. No. VCU241516)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Melinda Reed, Judge.

Richard G. Rumery for Plaintiff and Appellant.

Law Office of David F. Candelaria and David F. Candelaria for Defendant and Respondent.

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Defendant Bruce Akin appeals from an order confirming an arbitration award in favor of plaintiff Sergio Prado and denying his petition to vacate the award. Akin

[*] Before Cornell, Acting P.J., Detjen, J. and Franson, J.

contends that he and his attorney did not attend the arbitration hearing because they believed it had been continued pending resolution of discovery issues involving Prado's inadequate responses.

The trial court found that Prado had refused Akin's request to continue the arbitration hearing and gave notice to Akin that the hearing would proceed as scheduled at Prado's counsel's office. The court also found that the arbitrator had not granted a continuance before the hearing.

The arguments presented by Akin on appeal are based on assertions of fact that are contrary to the findings of the trial court, yet Akin has not argued or otherwise established that the court's findings are not supported by substantial evidence. Pursuant to the applicable standard of review, we accept the version of events as found by the trial court, not the version presented by Akin.

We therefore affirm the order confirming the arbitration award.

BACKGROUND

Akin and Prado entered an agreement pursuant to which Prado agreed to harvest Akin's olives and deliver them to a processor. In return, Akin agreed to pay Prado $400 per ton of crop delivered.

Akin contends that Prado and his crew used improper harvesting and handling methods that damaged as much as 50 percent of the olives delivered to the processor. Akin further contends that a large percentage of the crop was rejected by the processor and he was fined $10,000 for delivering an inferior crop. Akin asserts that he withheld $10,000 from his payment to Prado because of the "shoddy work" provided.

It appears that Prado filed this lawsuit against Akin and the parties agreed to resolve the matter through arbitration. A hearing date of May 30, 2012, was scheduled before arbitrator Richard B. Isham.

Exactly what happened before the May 30, 2012, hearing is subject to some disagreement. Akin's opening brief described matters that occurred during December

2011 through April 2012 and were related to discovery and the adequacy of Prado's responses. Akin's opening brief continues:

> "On May 8, 2012, [Akin] received [Prado's] responses to the supplemental demand but did not receive any responses to the meet and confer letter. Therefore, on May 24, 2012, [Akin] sent a letter to [Prado] stating that the May 30th arbitration will need to be canceled due to the fact that discovery had not been completed. On May 25, 2012 [Prado] sent a letter to [Akin] stating that he did not agree to continue the arbitration and will appear and be ready to proceed on May 30th."

Akin's opening brief also describes (1) a May 25, 2012, phone conversation between a paralegal in his attorney's office and the arbitrator and (2) a May 29, 2012, phone conversation between his attorney and the arbitrator. The brief then states: "All things considered, … it was assumed that the May 30th arbitration had been cancelled."

The arbitration hearing went forward on May 30, 2012, at the office of Prado's attorney. Prado's respondent's brief asserts that, after the arbitration hearing, "the arbitrator agreed the sum of $29,201.20 was due [Prado] by [Akin] in its entirety, and, pursuant to the Decision and Award of Arbitrator, interest at the legal rate from January 15, 2011, [plus] … costs of suit."

On November 5, 2012, the trial court heard argument on the petitions concerning the arbitration award. Near the end of that hearing, the court adopted its tentative ruling, which was to grant Prado's petition to confirm the arbitration award and deny Akin's petition to vacate the award.

The trial court's written order of November 5, 2012, is quoted in detail in part II.A, *post*, of this opinion.

On December 28, 2012, Akin filed a notice of appeal from the November 5, 2012, "order dismissing a petition to confirm, correct or vacate an award. CCP 1294 (b)."

DISCUSSION

I. APPEALABLE ORDER AND STANDARD OF REVIEW

A. Appealability

Prado contends that the order denying Akin's petition to vacate the arbitration award in not an appealable order.

The California Arbitration Act (Code of Civ. Proc., § 1280, et seq.)[1] governs the arbitration award at issue in this appeal. Section 1285 provides: "Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award." Appeals from a trial court's decision are addressed in section 1294, which provides that an aggrieved party may appeal from an "order dismissing a petition to confirm, correct or vacate an award." (§ 1294, subd. (b).)

Prado's argument of nonappealability is supported by cites to cases that are over 50 years old and does not consider section 1294, the interpretation of the phrase "order dismissing a petition," or the possibility that an appellate court might liberally construe the notice of appeal as an appeal from a judgment. (Cf. *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 531 [order granting summary judgment is not appealable, but later judgment is appealable; appellate court construed notice of appeal naming order as an appeal of a final judgment]; *Gonzales v. County of Tulare* (1998) 65 Cal.App.4th 777, 782, fn. 4 [nonappealable order sustaining a demurrer deemed to include an appealable judgment of dismissal].)

In this case, we will construe Akin's notice of appeal as an appeal from a final judgment. (§ 1294, subd. (d).)

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

B. Standard of Review

After a trial court has confirmed an arbitration award and a party has appealed that decision, "we review the trial court's order (not the arbitration award) under a de novo standard. [Citations.] To the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues." (*Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 892, fn. 7.)

Under the substantial evidence test, "the power of the appellate court begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding." (*Kimble v. Board of Education* (1987) 192 Cal.App.3d 1423, 1427.) "We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

Evidence is "substantial" for purposes of this standard of review if it is reasonable, credible and of solid value. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935-936.) For example, the testimony of a single witness, even if a party to the case, may constitute substantial evidence. (See *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

II. CLAIMS OF ERROR

The record on appeal is limited. It includes a reporter's transcript of the November 5, 2012, hearing. There is no clerk's transcript, appellant's appendix, or respondent's appendix.

Our copy of Akin's notice of appeal states that he is appealing the November 5, 2012, order dismissing a petition to vacate an award. Attached to the notice of appeal is a copy of the trial court's November 5, 2012, minute order.

A. Trial Court's Decision

Due to the limited nature of the appellate record in this case, we will quote extensively from the trial court's November 5, 2012, minute order.

"Here, [Akin] claims the arbitration award should be vacated under CCP section 1286.2(a)(3) because his rights were substantially prejudiced by the arbitrator and because the arbitrator failed to file a disclosure statement.

"The evidence shows that the parties stipulated to an arbitration hearing date of May 30, 2012, that [Prado] refused [Akin's] request to continue the hearing and gave notice to [Akin] that the hearing would proceed as scheduled at [Prado's] counsel's office, and that the arbitrator did not allow for a continuance of the matter prior to the arbitration.

"The evidence further shows that [Akin] attempted to unilaterally cancel the hearing because [Akin] was dissatisfied with [Prado's] discovery responses. However, [Akin] has presented no authority, and the court knows of none, which allows one party to cancel an arbitration hearing without the consent of all parties and the arbitrator.

"[Akin's] remedy for continuance is to make a proper noticed motion. Likewise, [Akin's] remedies for deficient discovery are set forth in the discovery act. Those remedies do not provide for the unilateral cancellation of a hearing. Instead of following proper procedure, it is apparent [Akin] knowingly and purposefully absented himself from the arbitration and the arbitrator was entitled to proceed in [Akin's] absence.

"As to the [lack of an arbitrator's] disclosure statement, there is no showing that there is any matter the arbitrator should have disclosed concerning his impartiality.

"In sum, the arbitration award is confirmed and [Akin's] motion to vacate the award is denied as [Akin] has failed to show adequate grounds upon which to vacate the award."

B. Grounds for Vacating the Award

1. Akin's Contentions

Akin contends that the arbitration award must be vacated for several reasons, including the fact that he was not given an opportunity to be heard.

Akin contends that, for purposes of section 1286.2, subdivision (a)(3), his rights were substantially prejudiced by the misconduct of the arbitrator because the arbitrator, "knowing that [Akin] and his Counsel would not be present, unilaterally and without notice conducted the arbitration hearing at opposing counsel's office in Porterville."

In addition, Akin contends:

> "Bias can be presumed in that the arbitrator unilaterally, without notice to [Akin] or his counsel moved the arbitration to opposing counsel's office. The arbitrator had also commented that he had done [an] arbitration the day before with opposing counsel. Thus, it appears the arbitrator may have had a preexisting social or business relationship with opposing counsel."

Akin summarized his position in the following paragraph:

> "In the present case, [Akin's] rights were substantially prejudiced by the misconduct of the arbitrator. Not only did he refuse to postpone the hearing after being presented with sufficient cause, he unilaterally moved the arbitration to a location not scheduled without notifying [Akin] or his counsel. Consequently, [Akin] was not given the opportunity to be heard which violations the United States Constitution."

2. Notice of the Hearing's Location

Akin claims his counsel was not notified of the new location for the arbitration hearing. This factual claim is directly contrary to the findings of fact made by the trial court. The court explicitly found that Prado gave notice to Akin "that the hearing would proceed as scheduled at [Prado's] counsel's office."

Akin has made no attempt to demonstrate that this finding of fact is unsupported by substantial evidence. Because Akin has not shown the trial court erred in making its finding about notice of the new location, Akin has failed to establish the factual basis for his first claim of arbitrator misconduct and for his claim that his constitutionally protected right to procedural due process was violated.

3. Apparent Bias

Akin's argument that "it appears the arbitrator may have had a preexisting social or business relationship with opposing counsel" leads us to consider whether the trial court erred when it found: "As to the disclosure statement, there is no showing that there is any matter the arbitrator should have disclosed concerning his impartiality."

The trial court's finding relates to the obligation of a proposed neutral arbitrator to disclose information pursuant to section 1281.9, subdivision (a). Under that subdivision,

"when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial …." In particular, the proposed neutral arbitrator must disclose any professional or significant personal relationship he or she has, or has had, with a lawyer for a party to the arbitration proceeding. (§ 1281.9, subd. (a)(6).)

In *Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, the appellate court stated that whether a particular business relationship might have created an impression of possible bias and, thus, was required to be disclosed presented a *factual question*. Similarly, in *Advantage Medical Services, LLC v. Hoffman* (2008) 160 Cal.App.4th 806, the court stated that whether information that might indicate bias triggers an arbitrator's duty to disclose is a question of fact and subject to review under the substantial evidence test. (*Id*. at p. 816.)

In this case, Akin has not acknowledged that he is challenging a finding of fact and, furthermore, has not carried his burden of showing that the trial court's finding about disclosure lacks sufficient evidentiary support. The appellate record contains none of the evidence that was presented to the trial court and, accordingly, it is not possible for us to determine that the evidence presented did not provide sufficient support for the trial court's finding regarding disclosure. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [appellant must affirmatively demonstrate prejudicial error]; see *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [to carry burden of demonstrating prejudicial error, an appellant must provide the appellate court with an adequate record of the lower court's proceedings].)

4. Refusal to Postpone the Hearing

Subdivision (a)(5) of section 1286.2 provides that an award shall be vacated if the court determines that the "rights of a party were substantially prejudiced by the refusal of

the arbitrators to postpone a hearing upon *sufficient cause* being shown therefor …." (Italics added.)

The trial court found that, instead of following proper procedure, Akin knowingly and purposefully absented himself from the arbitration and the arbitrator was entitled to proceed in Akin's absence. These findings mean that "sufficient cause" was not shown for postponing the arbitration.

The appellate record does not contain the evidence presented to the trial court in connection with the petition to confirm or vacate the arbitration award. This absence of information requires this court to conclude that Akin has failed to demonstrate that the finding of insufficient cause lacked evidentiary support. Thus, Akin has not established that the trial court erred in applying section 1286.2, subdivision (a)(5) to his petition to vacate.

DISPOSITION

The trial court's order denying defendant's petition to vacate the arbitration award is affirmed. Plaintiff shall recover his costs on appeal.